

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA

V.

JOHNATHON IRISH

DOCKET NO. 19-CR-251-LM

MEMORANDUM OF LAW REGARDING A SPECIAL VERDICT

The use of a special verdict form is permitted in criminal cases. *United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998) (“Exceptions to the general rule disfavoring special verdicts in criminal cases have been expanded and approved in an increasing number of circumstances.”). This court has the discretion to order their use. *United States v. Soto-Beniquez*, 356 F.3d 1, 45 n. 9 (1st Cir. 2004). *See, e.g., Connick v. Thompson*, 563 U.S. 51, 92 (2011); *Washington v. Recuenco*, 548 U.S. 212 (2006); *McKoy v. North Carolina*, 494 U.S. 433 (1990); *United States v. Alfonzo-Reyes*, 592 F.3d 280, 293 (1st Cir. 2010); *United States v. Gonzalez-Velez*, 587 F.3d 494, 496-497 (1st Cir. 2009); *United States v. Sanchez-Badillo*, 540 F.3d 24 (1st Cir. 2008).

Special verdict forms are often used in criminal cases involving amounts of illegal narcotics in order to prevent any *Apprendi* problem. *See Alfonzo-Reyes*, 592 F.3d at 292; *United States v. Aviles-Colon*, 536 F.3d 1, 27 (1st Cir. 2008); *United States v. Dickerson*, 514 F.3d 60, 63 (1st Cir. 2008); *United State v. Gomez-Rosario*, 418 F.3d 90, 103 (1st Cir. 2005). The purpose of special verdict forms in these cases

is to ensure that a guilty defendant is given a sentence that reflects the amount of drugs that the jury found beyond a reasonable doubt were involved in the case. Special verdict forms are necessary to reveal the jury's factual findings.

Special verdict forms may be required to ensure defendants' due process and Eighth Amendment rights. *McKoy v. North Carolina*, 494 U.S. 433, 457-58 (1990) (Scalia, J., dissenting); *see also Dickerson*, 514 F.3d at 63 (indicating that special verdict forms may be necessary to ensure defendants' "substantial rights"); *United States v. Jordan*, 351 Fed.Appx. 248, 250 (9th Cir. 2009) (where the theory underlying a conviction makes a "practical difference," due process may require a special verdict form); *United States v. Liddell*, 64 Fed.Appx. 958, 960 (6th Cir. 2003); *United States v. Feldman*, 853 F.2d 648, 660-61 (9th Cir. 1988).

"Due process commands that no man shall lose his liberty unless the Government has borne the burden of convincing the factfinder of his guilt." *In re Winship*, 397 U.S. 358, 364 (1970). In the instant case, the use of a special verdict form is essential to satisfy the defendant's due process rights. This court should know whether, if the jury returns a verdict of guilty, it has done so because the defendant possessed the pistol or because he possessed the shotgun.

Defendant
Johnathon Irish
By his Attorney,

/s/ Benjamin L. Falkner
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Dated: February 7, 2020

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the within document upon the attorney of record for the Government via the Court's ecf system on February 7, 2020.

/s/ Benjamin L. Falkner
Benjamin L. Falkner